moral welfare and that merely because a woman has once committed adultery, it cannot be said she is not a fit person, *vis-á-vis* one who has not, to have the care and control of a child.

Even if the ceremony of marriage between the 1st respondent and Gurdial Singh was invalid and she is and has been living in adultery with him then on the authority of the cases to which I have referred that would be no reason for depriving the mother of the care and control of the boy and I accordingly do not take it into consideration. Secondly the section requires me to "consider the wishes of the parents". Now the father has, through no fault of his own, been deprived of the custody, care and control of his son by the wrongful act of the mother in deserting her husband without cause and taking the boy away with her. The father has throughout exercised considerable patience and in my opinion behaved with commendable moderation and restraint and I attach considerable importance to his wishes in these circumstances. He is in a position to give his son the benefit of a comfortable and substantial home in surroundings vastly superior to those under which he is now living together with all the advantages of security, education and healthy family associations which he is not, in my opinion, at present enjoying or likely to enjoy.

In the interests of the child alone and having regard primarily to his welfare, both moral and physical, I have come to the conclusion that the sooner he is removed from his present environment, which I consider in every respect both undesirable and unsatisfactory, the better.

There must be an order in terms of the first two prayers of the summons. The question of access will be adjourned to be dealt with in Chambers.

The applicant must have his costs agreed at $400 of these proceedings.

Application allowed.

Solicitors: *Francis & Co.; K. K. Bezboruah.*

F. XAVIER v. K. KATHAMUTHU KONAR

[A.C.J. (Good J.) February 12, 1958]

[Ipoh — Civil Appeal No. 9 of 1957]

Moneylending — Note or memorandum of moneylenders' contract to be given to borrower — Moneylenders Ordinance, 1951, s.16(1).

The only point for decision in this appeal was whether or not the plaintiff (respondent) was precluded from enforcing the contract for the repayment of the loan and the security given in respect thereof if he failed to comply with the requirements of section 16(1) of the Moneylenders Ordinance, 1951.

Held: where a promissory note has been given as a security for a loan both the promissory note and the contract for the repayment of the loan in respect of which it was given are unenforceable by the lender against the borrower unless the lender has delivered an authenticated copy of the promissory note to the borrower before the money is lent as required by section 16(1) of the Ordinance.

Cases referred to:—

(1) *Ang Khye Pang v. Chop Ban Aik*, (1939) M.L.J. 282, 285.

(2) *Sockalingam v. Ramanayake*, (1937) 1 All E.R. 196, 201, P.C.

CIVIL APPEAL.

S. P. Seenivasagam for the appellant.

B. K. Das for the respondent.

Cur. Adv. Vult.

Good J.: — This is an appeal against the decision of the Ipoh Magistrate awarding a sum of $755.10 to the plaintiff/respondent which sum represented a loan of a principal sum of $600 and $155.10 interest secured by a promissory note executed by the defendant/appellant.

Only one point arises on this appeal, namely, whether or not the plaintiff/respondent was precluded from enforcing the contract for the repayment of the loan and the security given in respect thereof if he failed to comply with the requirements of section 16(1) of the Moneylenders Ordinance, 1951.

Mr. Das for the respondent argued that where a promissory note which complies with the requirements of section 16(4) is given by a borrower to a moneylender the promissory note is a sufficient note or memorandum of the contract and that section 16(1) does not apply. I cannot accept the latter part of this contention. All that section 16(4) says in effect is that where a promissory note which complies with certain requirements is given no other note or memorandum of the contract is necessary; but it only makes the promissory note a "sufficient note or memorandum of the contract *for the purpose of this section.*" One of the purposes of the section is to ensure that the borrower before committing himself by accepting the money is in possession of a duly authenticated copy of the note or memorandum of the contract; in other words, that he is protected by having in his possession a true record of the undertaking to which he has committed himself. There is abundance of authority for the proposition that the provisions of the Moneylenders Ordinance must be strictly

complied with (for example, the last paragraph of the judgment of Poyser, C.J., in *Ang Khye Pang v. Chop Ban Aik*[1]).

The Privy Council case from Ceylon, *Sockalingam v. Ramanayake*,[2] on which Mr. Das relied, does not seem to me to affect the position. In the judgment, delivered by Sir Lancelot Sanderson, the following passage occurs:

"……it was contended on behalf of the defendants that inasmuch as the promissory notes were taken as security for the loans and were not only unenforceable by reason of section 10 of the Ordinance but were, by necessary implication from section 13, prohibited, the plaintiffs were not entitled to recover the loans, or any part thereof. In considering the above-mentioned contentions, the first thing to be observed is that in the Ordinance the loan is treated as being something different from the promissory note, which is therein described as a security. The provisions of section 10 make that clear. The section begins with the sentence, "In every promissory note given as security for the loan of money." This must be remembered in construing the material words of section 10 (2), viz:

any promissory note not complying with the provisions of this section shall not be enforceable,

that is to say, the security, consisting of the promissory note, for the loan is not to be enforceable. The subsection does not provide that the loan shall be irrecoverable. If that had been intended, it could easily have been so provided."

But the distinction between the wording of section 10(2) of the Ceylon Ordinance and section 16(1) of our local Ordinance is most striking: the Ceylon legislation merely makes the promissory note, i.e. the security for the loan, unenforceable, whereas our legislation makes both the contract for the repayment of the loan, *and* any security given in respect of such contract, unenforceable unless certain requirements are complied with.

Mr. Das further submitted that the application of section 16(4) excludes the operation of section 16(1) because the second "limb" of section 16(1) would be repugnant to section 16(4). The words which Mr. Das calls the second limb of section 16(1) are:

"……and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed before the money was lent *or before the security was given*, as the case may be."

The meaning of these words appears to me to be perfectly clear: the contract for the repayment of the loan shall not be enforceable if it is proved that the note or memorandum of the contract was not signed by the parties or their agents before the money was lent, and where security for the loan is given, the security shall not be enforceable unless the note or memorandum is signed by the parties or their agents before the security was given. Where a promissory note is both the note or memorandum and the security, it must be signed both before it is "given" i.e. delivered to the lender with an authenticated copy to the borrower and before the money is handed over by the lender to the borrower otherwise neither the contract for repayment nor the security itself shall be enforceable.

I am unable to find any support for the proposition that the application of section 16(4) excludes the operation of section 16(1) and it follows that where a promissory note has been given as security for a loan both the promissory note and the contract for the repayment of the loan in respect of which it was given are unenforceable by the lender against the borrower unless the lender has delivered an authenticated copy of the promissory note to the borrower before the money is lent.

It is clear from the respondent's evidence in this case that no such copy was given. What happened is described by the plaintiff in his cross-examination on page 3 of the Magistrate's notes (page 14 of the Appeal Record):

"I cannot remember sending the copy. Defendant wrote the pro-note in ink. He wrote two of the pro-notes: one was on red form. The red form was about the same size as Ex. P1. I bought the forms P1 from printing press. The red form was also bought by me. *I do not know if the forms are similar in words.* I can only read the figures and dates in P1."

The respondent not only failed to authenticate a copy of the promissory note; he was not even in a position to do so as he appears to have been unaware of its contents and admits that he did not know whether what the defendant wrote on the second form was in fact a copy of the promissory note or not.

I have come to this conclusion with some regret as it seems to me that the borrower has taken advantage of a technical defect in order to evade liability. However, the requirements of the Moneylenders Ordinance have been enacted by the legislature for the protection of borrowers and the moneylender has only himself to blame if he does not comply strictly with them. I allow the appeal with the costs of both the appeal and of the proceedings in the Court below to the appellant.

Appeal allowed.

Solicitors: *S. Seenivasagam & Sons*; *Das & Co.*